

TEN SIGNIFICANT ISSUES FOR 1999

by

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Few contracts attorneys predict that 1999 will be a year of dramatic change in terms of new statutory or regulatory initiatives. Conversely, many realize that rapid change will continue to dominate Federal procurement. At a fundamental level, the coming year brings little more than renewed emphasis upon continued implementation of major procurement reforms. Conversely, significant changes in fundamental business methodologies and technologies, as well as dramatic evolution (driven by, for example, workforce reduction) in procurement personnel issues and what is expected of these professionals (for example, heightened expectations regarding exercise of discretion and business acumen) will keep counsel busy.

Looking into the crystal ball for 1999, numerous trends compete for attention. Unfortunately, time, space, and the gimmick of a top-ten list squeeze out a number of other pressing issues, particularly privatization/outsourcing and past performance. Fortunately, the symposium will create other opportunities to examine these, and other, issues.

10. ELECTRONIC COMMERCE (EC) MOVES INTO THE MAINSTREAM.

No legislation, regulation, nor policy will change the way that we do business as much as the rapid development of electronic commerce. Fortunately, Congress has recognized (at least temporarily) that it cannot legislate technology evolution. Equally important, the Government seems intent on identifying, and willing to take advantage of, developments in the commercial sector. Look for increased efforts to address the issue of a government-wide single point of entry to Federal procurement.

General Information. Judith Gebauer, Carrie Beam, and Arie Segev, *Impact of the Internet On Procurement*, ACQUISITION REVIEW QUARTERLY, Spring 1998

Government-wide.Commercial Information Dissemination, Efforts

Acquisition Reform Network -- <http://w\vw.arnet.gov>; Federal Acquisition Jumpstation -- <http://nais.nasa.gov/fedprocihome.html>

Electronic Commerce Resource Center
<http://www.ecrc.ctc.com/inde.x.htm>

Electronic Processes Initiatives Committee (EPIC) of the President's Management Council March 1998 Report and Strategic Plan --
<http://policyworks.gov/org/main/me/epic/opendocs/>

Joint Electronic Commerce Program Office (JEPCO) --
<http://www.acq.osd.mil/ec/>

DoD Electronic Mall (E-MALL) -- <http://www.emall.dla.mil/Default.asp>; Electronic Catalogs -<http://www.arnet.gov/References/References.html#catalog>

Electronic Commerce Navigator -<http://www.acq.osd.mil/ec/navigator/index.html>

Electronic Government & Electronic Commerce
<http://policyworks.gov/org/main/me/smartgov/egec/egec.htm>

Navy Paperless Acquisition, Standard Procurement System (SPS) <http://www.abm.rda.hq.navy.mil/paperles.html>;
<http://www.peoarbs.navy.mil/>;
<http://www.abm.rda.hq.navy.mil/sps/index.html>

Electronic Tools

FAR-- <http://www.arnet.gov/far/>
DOD Deskbook -- <http://www.deskbook.osd.mil/>
Thomas -- <http://thomas.loc.gov/>
Federal Register-http://www.access.gpo.gov/su_docs/aces/aces_140.html
CBDNet -- <http://cbdnet.gpo.gov/>
Central Contractor Registration (CCR) --
<http://ccr.edi.disa.mil/ccragent/plsql/ccr.welcome>

Legitimate Concerns include *Year 2000* problems, e.g., Year 2000 Information and Readiness Disclosure Act of 1998 -- <http://www.y2k.gov/>; and *PKI/public key infrastructure* -- a system of digital certificates, Certificate Authorities, and other registration authorities that verify and authenticate the validity of each party involved in an Internet transaction. There is no single agreed-upon standard for setting up a PKI. See http://webopedia.internet.com/TERM/p/public_key_infrastructure.html;
<http://www.opengroup.org/public/tech/security/pki/cki>

9. LIVING IN THE WORLD OF COTS (COMMERCIAL OFF THE SHELF).

The pendulum has swung towards all things commercial, and there seems little gravity drawing it back. The commercial marketplace, however, is a jungle. Moreover, principles of the "marketplace" work best where there is a "market." Let's agree that the Government should apply commercial practices to procure commercial items. Can the Government leave well enough alone, or will we be forced to believe that everything is commercial?

See, e. g., <http://www.arnet.gov/References/fssciate.html>

Rocco J. Maffei & Jason J. Richter, *COTS -- Updating and the Government Contractor Defense*, 29 NAT'L CONT. MGMT. J. 1 (1998); Corey Rindner, *Can Government Really Contract Commercially?*, 38 CONT. MGMT. 3 (November 1998); Daniel R. Petersen, *Government Procurement and the UCC: How the Code Affects Federal Contracting*, 38 CONT. MGMT. 8 (November 1998); Joseph Summerill & Todd Bailey, *The Use of UCC-Implied Warranties in Public Contracts*, 38 CONT. MGMT. 12 (November 1998), Edward G. Elgart, *Buying Commercial Simply Makes Sense*, 38 CONT. MGMT. 44 (November 1998).

8. CONTINUED, DRAMATIC REDUCTION IN LITIGATION (IS IT HIBERNATION?).

There are fewer protests. There are fewer CDA disputes. Why? Are there fewer contracts? Are ADR and partnering reducing litigation? Has the specter of past performance chilled contractors' willingness to exercise their rights? Is there a backlash in waiting?

Protests, Fora. See generally, GAO -- <http://www.gao.gov>, http://www.access.gpo.gov/su_docs/aces/aces170.shtml; see also Court of Federal Claims -- <http://www.law.gwu.edu/>

Disputes CDA. Etc. Last year, the ASBCA reported a decrease in appeal activity for the sixth consecutive year. In fiscal year (FY) 1997, the ASBCA docketed 923 appeals, compared to 1712 new appeals in FY 1992.

The volume of contract litigation in the Court of Federal Claims remained steady during that period. In FY 1997, the CFC docketed 280 contract cases compared to 291 in FY 1992. See. CONFERENCE BRIEFS: THE FEDERAL PURCHASE AND TO GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE. COVERING 1997. Chapter 6. Disputes (1998) (see 1993 Conference Briefs for 1992 statistics). CFC cases now account for a greater percentage of the total numbers of CDA actions filed. See also. ASBCA -<http://www.law.gwu.edu/asbca/>

7. IMPLEMENTATION OF, AND LITIGATION STEMMING FROM, THE FAR PART 15 RE-WRITE.

After all of that attention and blood-letting, now, as they say, the proof is in the pudding. Will Contracting Officers exercise greater discretion? Will they engage in hard bargaining? Numerous issues will be litigated. Four key battlegrounds will be issues relating to: (1) Award based upon initial proposals; (2) Competitive range determinations; (3) Exchanges - will there be more clarifications, and fewer discussions; and (4) Oral presentations, see generally, <http://www.pr.doe.gov/oral.html>.

6. IMPLEMENTATION OF NEW SMALL BUSINESS (AND OTHER SOCIAL PROGRAMS)

How can we balance the objectives of our procurement system? Some suggest that the greatest threat to procurement reform or reinvention is the inevitable return of aggressive social programs imposed upon the system. Can these programs co-exist? Are these equally compelling concerns? Are they more or less important than saving money, customer satisfaction, etc.?

The system faces expanded demands (many of which derive from recent statutory changes) to provide opportunities for small business, such as: (1) Bundling; (2) Affirmative action; (3) HUBZones; (4) Goal increase(s). Minor details will impact the system, e.g., the SIC to NAICS transition - <http://www.census.gov/epcd/www/naics.html>.

The "other" social program: buying green. See generally, [http://www. Ofee.gov/](http://www.Ofee.gov/); Greening the Government: A Guide to Implementing Executive Order 12873; New E.O. --[http://w~vw.ofee.gov/eol3 101/ 13101.htm](http://w~vw.ofee.gov/eol3_101/13101.htm); *Recycling. . . for the Future* -[http://www.ofee.gov/html/ future.htm](http://www.ofee.gov/html/future.htm). ("Environmentally preferable" means products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose.)

5. THE REALITY OF LIMITS UPON COMPETITION (MULTIPLE AWARD TASK ORDER AND DELIVERY CONTRACTS).

The darling of acquisition reform -- and the scapegoat of small business advocates -- has attracted another band of critics. Unfortunately (for this flexible vehicle), the critics are competition advocates, and they have a legitimate gripe.

See generally. OMB Deputy Director For Management Memorandum: The Presidents Management Council. Subject: Competition Under Multiple Award Task and Delivery Order Contracts, dated April 21. 1998 --<http://www.arnet.gov/References/memopmc.html>; see also, OFPP Memorandum for The Federal Acquisition Regulations Council, Subject: Proposed Change to FAR Subpart 16.5 Relating to Competition Under Multiple Award Task and Delivery Order Contracts, dated April 21, 1998 -
<http://www.arnet.gov/References/compmac.html>. See also, The Multiagency/GWAC Program Managers Compact: A Consensus On Principles Applicable to the Acquisition of Services Under Multiagency Contracts and Government-wide Acquisitions --<http://www.arnet.gov/References/magycom.html>. See also the recent GAO Report.

4. EVOLUTION OF PERFORMANCE BASED CONTRACTING (SPECIFICALLY PERFORMANCE BASED SERVICE CONTRACTING(PBSC)).

Just because everyone agrees it's a great idea, that does not mean that anyone knows how it works, or how to use it effectively. Is there hope?

See generally, Practices
<http://www.arnet.gov/BestP/BestPract.html>. See also, the PBSC Solicitation/Contract/Task Order Review Checklist --<http://www.arnet.gov/>

References/Policy_Letters/pbsckkls.html; and draft statements of work, at <http://w~vw.arnet.gov/References/References.html#OFPP>

3. MAXIMIZING THE USE, AND MINIMIZING THE ABUSE, OF THE GOVERNMENT CHARGE CARD; OR HARNESSING (OR WASTING) THE POWER OF THE NEXT

Charge card usage (basically) has doubled each year since the Government introduced the IMPAC card. Early indicators point toward FY 98 charge card spending of almost SUB. Charge cards saves the Government time and money. The new smart card technology should make the credit card a more powerful tool for micro-purchases and as a payment vehicle. Specifically, the smart card technology may lead to greater insight into what is being bought with the charge card, and from whom. Do you think that information will be good or bad news? See generally, <http://www.gsa.gov/impac/>; <http://pub.fss.gsa.gov/fm/current/>; <http://policyworks.gov/org/main/me/smartgov/cards/cards.htm>.

2. CHANGE MANAGEMENT FOLLOWING AN ERA OF RAPID ACQUISITION REINVENTION

The current OFPP Administrator has identified "implementation" as the primary focus of her efforts. This properly reflects the chasm between the acquisition reforms achieved in legislation, regulation, and policy, and the day-to-day activities of procurement professionals. This chasm will close only with significant investments (both money and time) in training/learning, information dissemination, skills development, and commitment by senior leadership, etc.

Dr. Mark E. Nissen, Dr. Keith F. Snider, and Dr. David V. Lamm, *Managing Radical Change in Acquisition*; Nancy C. Roberts, *Radical Change by Entrepreneurial Design*; Dr. Kathleen K. Reardon, Dr. Kevin J. Reardon, and Dr. Alan J. Rowe, *Leadership Styles for the Five Stages of Radical Change*; Susan Page Hocevar and Walter E. Owen, *Team-Based Redesign as a Large-Scale Change*; *Applying Theory to The Implementation Of Integrated Product Teams*; Lauren Holland, *The Weapons Acquisition Process: The Impediments to Radical Reform*. ACQUISITION REVIEW QIARTERLY' Spring 1998 (Special Issue).

Steven L. Schooner, *Book Review Change, Change Leadership, and Acquisition Reform*, 26 PUBLIC CONTRACT LAW JOURNAL 467 (1997).

Robert A. Welch. *The Procurement Manager of the Future*. 37 CONTRACT MANAGEMENT 4 (December 1997); Ralph C. Nash, Jr. *Training the Contracting Officer of the Future*. 37 CONTRACT MANAGEMENT 13 (March 1997); Evelyn Layton. *The Defense Acquisition University' Changes Its Fundamental and Intermediate Contracting Courses*. 38 CONTRACT MANAGEMENT 27 (October 1998).

U.S. Office of Personnel Management. Qualification Standard for GS-1102 Contracting Positions -- <http://www.opm.gov/qualstd/html/1102qual.htm>

1. THE BALKANIZATION OF FEDERAL PROCUREMENT (OR WHAT EVER HAPPENED TO A UNIFORM PROCUREMENT SYSTEM?).

How far have we come from April 1, 1984, when the Federal Acquisition Regulation (FAR) became effective, and was intended to be a single, government-wide regulation? With micro-purchase authority, commercial practices, government-wide acquisition contracts, and other transactions authority, do we have something that we can call a procurement system? Does it matter if most of the government's procurements are not conducted by contracting officers?

FAA Life Cycle Acquisition Management System (AMS) -- see generally, the FAA Acquisition System Toolset (FAST) -- <http://fast.faa.gov/>; Office of Research and Acquisition -- <http://www.faa.gov/ara/arahome.htm>; Office of Disputes Resolution for Acquisition -- <http://www.faa.gov/agc/>

Is the Department of Veterans Affairs aiming to be the next FAA?
<http://www.va.gov/oa&mn/>

Other Transactions Authority -- <http://www.abm.rda.hq.navy.mil/bpot.html>; see also DoD IG, *Financial and Cost Aspects of Other Transactions*, (98191, Aug. 24, 1998); see also, Ralph C. Nash & John Cibinic, *Dateline November 1998* 12 NASH & CIBINIC REP. 161 (November 1998).